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IN THE

Supreme Court of the United States

October Term, 1957

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, SUCCESSOR BY CONSOLIDATION TO THE INDIANA TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GUY E. STREET, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA AND GARY CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE,

Respondent.

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

(a) Opinions Below

The statements of the taxpayer and the Government agree, except that the taxpayer's Petition gives the Court the benefit of the unofficial reports which selected for publication both the District Court's Findings and Conclusions

and the Seventh Circuit's reversal, because of the importance of the federal estate tax questions involved.

(b) Jurisdiction

The parties agree that 28 U.S.C. 1254 (1) gives this Court jurisdiction, but the taxpayer also shows that Rule 19, 1(b) specifies the grounds for certiorari.

(c) Questions Presented

The Government fails to argue the following questions:

(1) the binding force of the testamentary direction to taxpayer to pay taxes from the residue;

(2) the binding effect of a state court's construction of the terms of a will or other judgment governing estate tax allocation;

(3) what constitutes consent or collusion in the proceedings of a state court which will vitiate its authority in federal matters?

(4) the requirement of the Internal Revenue Code, Section 812 (e) (1) that the marital deduction amount be reduced by death taxes only if a part of such taxes is in fact apportioned against the marital deduction property; and

(5) the violation of the Fifth Amendment's due process clause which results from taxing an estate as though the residuary trust received property which was actually distributed to the widow free of the residuary trust.

These are all questions of federal law.

This case decides questions (2), (3) and (4), contrary to the Third Circuit Court of Appeals' decision in *Babcock's Estate v. Commissioner*, 234 F. (2d) 837. It decides

the questions contrary to the Tenth Circuit on question (1) in *Thompson v. Wiseman*, 233 F. (2d) 734 and on questions (2) and (3) in *Brodrick v. Gore*, 224 F. (2d) 892 and *Brodrick v. Moore*, 226 F. (2d) 105. On questions (2) and (3), this decision conflicts with the Fourth Circuit in *Pitts v. Hamrick*, 228 F. (2d) 486; on (3), with the Sixth Circuit in *Goodwin's Estate v. Commissioner*, 201 F. (2d) 576. *The decision herein conflicts with the principles of law established by the following decisions of the United States Supreme Court.* On (1), *Harrison v. Northern Trust Company*, 317 U. S. 476; *Blair v. Commissioner*, 300 U. S. 5. On (2) and (3), *Blair v. Commissioner*, 300 U. S. 5, and *Freuler v. Helvering*, 291 U. S. 35, 41, 44-5. Relevant to (4), *Harrison v. Northern Trust Company*, 317 U. S. 476 and the dissent in *Freuler v. Helvering*, 291 U. S. 35. On (5), the authorities under (4), *Heiner v. Donan*, 285 U. S. 312, and *Hoeper v. Tax Commission*, 284 U. S. 206, coupled with *Bolling v. Sharpe*, 347 U. S. 497.

The Government's brief likewise ignores the following questions of federal procedure inherent in the Seventh Circuit's decision herein:

(1) Can the Court of Appeals avoid the legal question of whether actual consent or collusion is necessary to vitiate the federal effect of a state court decree by falsely stating that the taxpayer agreed that proof of consent or collusion is unnecessary?

See Petition for Certiorari, pages 14 and 20.

(2) When the Court of Appeals decides in favor of the appellee on the only specific issue of fact raised by the appellant, can it reverse the District Court's judgment on the resulting general question of fact?

See Petition, pages 14-15 and 21.

(3) When the parties stipulate that a certain judgment is the final judgment of the state court, can the Court of Appeals treat some other decree of the state court as the final judgment, contrary to the stipulation and to the law of the state?

See Petition, pages 15 and 21.

(4) Can a Circuit Court consider one party's independent decision not to allow his attorney to appeal from state court's judgment as evidence proving consent to the judgment or any later identical judgment, when there is undisputed evidence to the contrary?

See Petition, page 15.

(5) When there are no decisions of higher state courts on the exact point of the widow's right to take marital deduction property free of taxes by electing to take against a will which directs the executor to pay death taxes out of the residue, can a Court of Appeals ignore the authority of the law of the case and of specific state statutes[1] by relying on dicta in two decisions under an election statute which was repealed in 1907[2] and upon a third case which enforced a specific agreement of the parties for the advancement of funds to pay estate taxes when the personal property was insufficient.[3]

See Petition, page 18.

These ten questions are matters of great importance to federal estate taxation, to federal-state judicial relationships, to federal appellate procedure and to individual constitutional rights. The marital deduction questions have not been passed upon by this Court. On these questions,

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[1] Burns' (1933) 6-2334 and especially Burns' 6-1907.

[2] *Clark v. Clark* (1902), 122 Ind. 25, 21 N. E. 461 and *Rowley v. Sowns* (1896), 141 Ind. 179, 40 N. E. 674; repealed by Burns' (1933), 6-2334.

[3] Cornet v. Gusdelhoefer (1941), 219 Ind. 200, 36 N. E. 2d 933.

this decision conflicts with decisions of the Third and Fourth Circuits and with the reasoning of the Tenth Circuit.

(d) Statutes and Regulations

Burns' 6-1301 is irrelevant. Since the residue was ample to pay all debts, costs of administration and taxes, the statute on priorities has no application to this estate.

The Government's citation of Burns' 6-301 is irrelevant and deceitful, because any life estate which might accelerate upon the widow's renouncing the will would fail to qualify for marital deduction in any event, since it would be a terminable interest. Moreover, the statute was enacted in 1953 and had no application to this estate, for the decedent died in 1950. His estate was governed by the rule of *Rocker v. Metzger* (1908), 171 Ind. 364 and *Cassidy v. Padgett* (1934), 99 Ind. App. 89, the principles of which survive this later statutory modification as to life estates.

STATEMENT OF THE CASE

The statement on pages 4-5 of the Government's brief: "The only answer in opposition to the complaint was filed on behalf of William McClenon as guardian *ad litem* of the minor and unborn children of himself and decedent's daughter, Ruth Gladys McClenon" is false. See Petition for certiorari, pages 54-55, 7, 8.

Copying the late Adolph Hitler, who appeared to believe that if a lie were repeated often enough it would be accepted as true, the Government says on page 6 of its brief, ". . . his (Mr. Travis') testimony was to the effect that his clients informed him that they were in accord with the order of the Probate Court, that they were in agreement with the contentions advanced by the executor and widow . . .".

This statement is not supported by a scintilla of evidence. It is also contrary to Mr. Travis' testimony on the subject. Pages 63-4 of the appendix to the Government's Court of Appeals brief are the only references given on page 8 which are on this subject. They are contrary to the statement, as are pages 60, 61, 62, and 63 of said appendix. The lie quoted above has been repeated in every brief the Government has written herein since the trial. The writer of the Seventh Circuit's opinion copied it verbatim. Under the Seventh Circuit's peculiar view that the later of two identical state court judgments was involved, this lie was decisive in the case. Such judicial irresponsibility cries out for certiorari.

ARGUMENT

Most of the argument of the Government is aimed at making this case appear to be limited to abstruse questions of Indiana probate law. It has been answered by pointing out the important issues of federal law and the conflict of Circuits. The Commissioner's intermeddling in questions of the probate law of the state as fairly determined by the state courts is precisely the evil that was intended to be avoided by the Federal estate tax as enacted by Congress. See the decisions of this Court in *Riggs v. Del Drago*, 317 U. S. 95, n. 4, 5; *Blair v. Commissioner*, 300 U. S. 5 and *Freuler v. Helvering*, 291 U. S. 35.

Contrary to the Government's statement on page nine, all but four of the taxpayer's twelve Indiana Supreme or Appellate Court decisions on probate matters involved elections against a will. See Petition for certiorari, page 17 and note 3. *So does Babcock's Estate v. Commissioner* (C. A. 3, 1956), 234 F. 2d 837. The *Babcock* case reversed a Tax Court decision which had been similar to the Seventh Circuit's decision here. Except for the taxpayer's case of *Cassidy v. Padgett*, 99 Ind. App. 234, 190 N. E. 133, not one of the Government's Indiana citations discusses the spouse's rights after an effective election against a will.

The point of probate law which is of general interest in federal taxation is that a widow renounces only the testamentary provisions *for her*, without affecting the directions to the executor to pay taxes from the residue. *Commerce Union Bank v. Albert* (Tenn., 1957), 301 S. W. 2d 352; Burns' (1933) 6-2334 and 6-1907. So the situation remains controlled by the will; it is not like total intestacy. Even if it were, *Pearcy v. Citizens Bank & Trust Co.* (1951), 121

Ind. App. 136, 96 N. E. 2d 918, 98 N. E. 2d 231 expressly adopts as Indiana law the Kentucky rule of equitable apportionment. Hence *Lincoln Bank and Trust Co. v. Huber* (Ky., 1951), 240 S. W. 2d 89 would be decisive authority for the taxpayer.

CONCLUSION

For the reasons set forth herein and in the Petition, this case presents federal questions which have never been passed on by this Court, or which have been decided contrary to the Seventh Circuit's erroneous reversal of both the state and the federal trial courts herein. It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

RALPH B. GREGG,
Attorney for Petitioner.

Of Counsel:
ARTHUR H. NORTHRUP.